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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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IN THE MATTER OF QWEST
CORPORATION'S COMPLIANCE
WITH SECTION 271 OF THE
TELECOMMUNICATIONS
ACT OF 1996

Docket No. T-00000A-97-238

**OPPOSITION OF QWEST CORPORATION TO
AT&T's MOTION TO REOPEN AND SUPPLEMENT THE RECORD**

Qwest Corporation ("Qwest" or "QC") respectfully opposes AT&T's September 26, 2002 Motion To Reopen and Supplement the Record. AT&T has filed substantially identical motions in all fourteen states in Qwest's region in what is clearly a last-ditch effort to delay the entry of a competitor into its core long-distance market. Even though the narrow section 272 issue that triggered the refiling of Qwest's federal section 271 applications does not vary from state to state, and even though the FCC is already in the midst of deciding this issue finally and for *all* states on an expedited comment schedule (and without asking for any additional state fact-finding proceedings), AT&T is now asking the fourteen commissions in Qwest's region to conduct fourteen separate investigations into the matter and redo their extensive section 272 inquiries from scratch.

There is nothing in the federal Telecommunications Act or any FCC rule or order that requires such a wasteful course of action, and no state has granted AT&T's request.

By its plain terms, the Act does not require the FCC to consult with state commissions on the non-state-specific section 272 questions at issue here, nor does it require states to issue recommendations with respect to section 272 *at all*. Moreover, the FCC has now indicated that it will imminently decide whether Qwest's new interLATA affiliate complies with section 272 as part of its consideration of Qwest's refiled federal applications, and the FCC's answer for those states will be the same as it would for Arizona.

In these circumstances, the prudent course of action would be for the Commission to issue *no* findings or recommendations at all on Qwest's section 272 compliance, and to simply leave that one subject for the FCC's imminent decision. There is no reason to delay the Commission's work and waste its resources by opening a parallel investigation into the very same matters the FCC is actively considering, especially when nothing about those matters is specific to Arizona.

BACKGROUND

Section 271(d)(3)(B) of the Federal Telecommunications Act requires the FCC to determine whether a section 271's applicant's "requested authorization will be carried out in accordance with the requirements of section 272."¹ The Commission Staff has already conducted an extensive review of Qwest's willingness and ability to comply with section 272, and an Administrative Law Judge ("ALJ") has closely reviewed Qwest's section 272 showing and the Staff's report. The Staff issued a draft report on November 14, 2001

¹ 47 U.S.C. §271(d)(3)(B).

finding that Qwest would comply with section 272.² After the Staff's draft report was released, Qwest provided the Staff and Commission with a report of a third-party accounting firm, KPMG LLP, that had conducted an independent review of Qwest's compliance with various section 272(b) and (c) requirements. KPMG's review conformed to the Staff's conclusion that Qwest and its affiliate had adopted a system of section 272 accounting controls that was "reasonably designed to prevent, as well as detect and correct, any noncompliance with section 272."³

Although AT&T filed comments on the draft report arguing that Qwest's controls were insufficient, the Staff rejected AT&T's comments and issued a final report on April 18, 2002 reaffirming its finding of section 272 compliance. The report concluded that Qwest "will provide in-region InterLATA service through an affiliate that is separate from the BOC," which meets all of the requirements of section 272.⁴ The Staff found further that "Qwest will maintain separate books and records in the manner prescribed by the FCC, with separate officers, directors and employees," that "[t]ransactions between the BOC and the Section 272 affiliate will be conducted on an arms length basis and reduced to writing, available for public inspection," and that "Qwest Corporation will not discriminate in favor of its Section 272 affiliate in any transactions

² Arizona Report on Qwest's Compliance with Section 272 (Nov. 14, 2001) at 46 ("Arizona Draft Staff Report").

³ Memorandum Opinion and Order, *Application by SBC Communications Inc., Southwestern Bell Telephone Co., and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-region, InterLATA Services in Texas*, 15 FCC Rcd 18354, 18549-50 ¶ 398 (2000) ("SBC Texas Order").

⁴ Arizona Final Report on Qwest's Compliance with Section 272 (Apr. 18, 2002) ("Staff Report") at 54. The Staff took note of the results of KPMG's independent testing in reaching these findings. *See Id.* ¶¶ 203-06, 225-42.

between the two and will account for all transactions with its Section 272 affiliate in accordance with FCC accounting principles.”⁵

After carefully reviewing the findings of the Staff, the ALJ concurred with the Staff’s conclusions. The ALJ Order found “no evidence that Qwest is not complying with Section 272 requirements”⁶ and issued a recommended Order finding Qwest in full compliance. Specifically, it concurred with Staff’s findings that

- Qwest has set up a separate entity, as required by section 272(a),⁷
- as required by section 272(b)(1), the BOC and the 272 affiliate “do not jointly own transmission and switching facilities or provide each other with Operations, Installation and Maintenance (OI&M) services,”⁸
- the section 272 affiliate maintains separate books, records, and accounts, as required by section 272(b)(2).⁹
- Qwest had implemented a system of controls that would “assure on-going compliance with GAAP.”¹⁰
- the BOC and the section 272 affiliate have separate officers, directors, and employees, as required by section 272(b)(3),¹¹
- the BOC’s transactions with the 272 affiliate are conducted at arms-length and described in postings that are sufficiently detailed and made available in a timely fashion, as required by section 272(b)(5),¹²

⁵ *Id.* at 54-55.

⁶ Arizona ALJ Order, (July 1, 2002)(“ALJ Order”) at ¶ 118.

⁷ ALJ Order ¶¶ 30-35; Staff Report ¶¶ 129-30.

⁸ ALJ Order ¶ 34; Staff Report ¶ 129.

⁹ ALJ Order ¶¶ 36-44; Staff Report ¶¶ 138, 144.

¹⁰ ALJ Order ¶¶ 36-40; Staff Report ¶ 138.

¹¹ ALJ Order ¶¶ 49-74; Staff Report ¶¶ 157, 161-63, 168, 171, 174, 177-78.

¹² ALJ Order ¶¶ 75-78, 83-90; Staff Report ¶¶ 181-83, 188, 195.

- the BOC has controls in place to assure against discrimination in favor of the section 272 affiliate,¹³ and to assure that its transactions with the 272 affiliate comply with the FCC's accounting rules,¹⁴
- the BOC and the section 272 affiliate comply with the requirement of section 272(d) that they pay for and commit to undergo a biennial audit,¹⁵

AT&T's proffered excuse for reopening the section 272 record is Qwest's decision to withdraw and refile its federal section 271 applications for nine other states in its region. As FCC Chairman Michael Powell publicly noted, the "outstanding issues" from those applications "were very narrow" and Qwest could "expeditiously resolve the outstanding issue that prevented approval."¹⁶ The only section 272 issue in question was whether a number of *past* transactions with *third parties* prevented Qwest's then-section 272 affiliate, Qwest Communications Corporation ("QCC"), from certifying that it "maintain[ed] books, records, and accounts in the manner prescribed by the Commission," within the meaning of section 272(b)(2)¹⁷ even though QCC was *presently*

¹³ ALJ Order ¶¶ 79-82, 91-94, 101-04, 111-114; Staff Report ¶¶ 186-88, 192, 199, 209-10, 219, 239.

¹⁴ ALJ Order ¶¶ 42-44, 95-100; Staff Report ¶¶ 203-06.

¹⁵ ALJ Order ¶¶ 45-48; Staff Report ¶¶ 149-50. The Staff and ALJ also found no reason to doubt that Qwest and its section 272 affiliate would comply with the joint marketing provisions of section 272(g). See Joint Filing of Arizona Corporation Commission Staff and Qwest Corporation on Section 272(g) Requirements, filed May 8, 2002; ALJ Order ¶¶ 105-10. The only requirement of section 272 that the ALJ and Staff did not expressly address — section 272 (b)(4) — is a provision on which no party challenged Qwest's compliance. In finding that Qwest would comply with all requirements of section 272, the Staff and ALJ in effect concluded that, as section 272(b)(4) requires, creditors of the section 272 affiliate would not have recourse to the assets of the BOC.

¹⁶ Statement of FCC Chairman Michael Powell on Withdrawal of Qwest's Multi-State 271 Applications, at 1 (rel. Sept. 10, 2002).

¹⁷ 47 U.S.C. § 272(b)(2). The FCC has prescribed generally accepted accounting principles, or GAAP, for these purposes. See Report and Order, *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, 11 FCC Rcd 17539 ¶ 170 (1996) ("Accounting Safeguards Order").

accounting for all new transactions correctly. Qwest and KPMG identified these past transactions as part of a broader, ongoing review of Qwest's corporate accounting policies and practices. But as a supplemental KPMG report confirmed, none of the transactions identified for potential restatement during this review that even *potentially* implicated section 272 were direct affiliate transactions between QC and QCC.¹⁸ Thus, these past transactions had nothing to do with the underlying purpose of section 272: to "ensure that BOCs do not discriminate in favor of their section 272 affiliates" by "discourag[ing] and facilitat[ing] the detection of . . . improper cost allocation and cross-subsidization between the BOC and its section 272 affiliate."¹⁹ Nor did they implicate any of the specific requirements of section 272 governing the QC-QCC relationship, as to which the ALJ and the Staff found clear and convincing evidence of compliance, as described above.

The question whether section 272(b)(2) extends beyond inter-affiliate transactions to transactions with third parties was one of first impression,²⁰ and Qwest and the FCC

¹⁸ See Comments of Qwest Communications International Inc. at 2 (September 4, 2002) (FCC WC Docket Nos. 02-148, 02-189).

¹⁹ Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Co., and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd 20719 ¶ 122 (2001) ("SBC Arkansas/Missouri Order").

²⁰ The FCC's *Accounting Safeguards Order* had implemented 47 U.S.C. § 272(b)(2) in tandem with the corresponding provision of section 272(c)(2) requiring a BOC to "account for all transactions *with [a section 272] affiliate . . . in accordance with accounting principles designated or approved by the Commission,*" (emphasis added) suggesting that only the accounting treatment for *inter-affiliate transactions* is relevant for section 272. The statutory provisions for a biennial audit to determine compliance with section 272 reinforce this understanding by giving auditors explicit rights of access *only* to those "financial accounts and records" of BOCs and affiliates that are relevant to the activities permitted for a section 272 affiliate and "necessary to verify transactions conducted *with that company*" [*i.e.*, with the BOC]. 47 U.S.C. § 272(d)(3)(A) (emphasis

were unable to reach agreement on the relevance of QCC's past accounting for third-party transactions within the ninety-day deadline on Qwest's first federal application. To avoid the need for the FCC to resolve this issue, Qwest created a new section 272 affiliate — Qwest LD Corp. ("QLDC") — that will maintain its books, records and accounts in the manner prescribed by the FCC, including GAAP.²¹ QLDC will commence operation as a switchless reseller of an unaffiliated long-distance company's interLATA services.²²

Qwest refiled its FCC application for the original nine states on September 30, 2002. The refiled application incorporates the entire record of the previous applications; the only new material is a short cover brief and three declarations — one containing updated competitive information and two addressing section 272. Far from suggesting that it cannot decide the section 272 issues in the absence of new state-by-state

added). Nevertheless, the *Accounting Safeguards Order* contains language that could be construed to require GAAP compliance for *all* of the section 272 affiliate's transactions, not just with the BOC; the order states, in describing section 272(b)(2), that "separate affiliates prescribed under section 272(a)(2) must maintain their books, records, and accounts in accordance with GAAP." *Accounting Safeguards Order* ¶ 170.

²¹ Because it is uncertain when this Commission's consideration of Qwest's section 271 application will be complete and whether the internal review of QCC's past accounting practices will also be complete by that time, Qwest does not yet know whether its future federal section 271 application for Arizona would use QLDC or QCC (following an expected earnings restatement) as the section 272 affiliate. In the meantime, to avoid having the Commission unnecessarily expend its resources while the choice of the affiliate is still uncertain, Qwest has asked the Commission to suspend the procedural schedule for its consideration of QCC's pending application for an amendment of its Certificate of Convenience and Necessity to provide inter- and intraLATA services and operator services within Arizona. This uncertainty over which affiliate Qwest may be using is another reason the Commission to refrain from issuing any recommendations on section 272 at all.

²² See Declaration of Judith L. Brunsting, Section 271(d)(3)(B) Compliance with Section 272 by Qwest LD Corp., *Qwest Communications International Inc., Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska, North Dakota, Montana, Utah, Washington, and Wyoming*, FCC WC Docket No. 02-314 (filed Sept. 30, 2002) ¶ 19(a) ("Brunsting Declaration").

investigations, the FCC immediately set Qwest's refiled application for comment on an expedited schedule, and even shortened the usual time for the application states to file their comments to fifteen days.²³ Even assuming the FCC takes the full ninety days to decide Qwest's refiled application (which appears unlikely, given the FCC's expedited comment schedule), it will decide all questions related to QLDC's compliance with section 272(b)(2) (and every aspect of section 272) by December 27, 2002 at the latest.

ARGUMENT

As noted above, no state has accepted AT&T's invitation to redo all of its section 272 proceedings from scratch, and the FCC is not waiting for additional state proceedings to decide whether Qwest's new affiliate complies with section 272. AT&T's proposal would serve no purpose other than delay. As the Washington Utilities and Transportation Commission noted in rejecting AT&T's identical motion in that state,

Neither the Act nor the FCC requires that this Commission reopen the proceeding. Further, at this time, reopening the proceeding would be a waste of administrative resources, if all fourteen states in Qwest's region—or even just our state—were to consider an issue that will soon be directly before the FCC.²⁴

Such a duplicative proceeding makes no more sense in Arizona than Washington.

²³ See Comments Requested on the Application by Qwest Communications International, Inc., For Authorization Under Section 271 of the Communications Act to Provide In-Region, Interlata Service in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming, Public Notice, DA 02-2438, FCC WC Docket No. 02-314 (rel. Sept. 30, 2002) ("Sept. 30 Public Notice") at 1, 7.

²⁴ 44th Supplemental Order; Denying AT&T's Motion to Reopen the Proceeding and Supplement the Record, Washington Utilities and Transportation Commission, Docket Nos. UT-003022, UT-003040 (Sept. 26, 2002) ¶ 1 ("Washington Order"). This order was written before the September 30, 2002 refiling and the issue is now directly before the FCC. The Washington Order is attached hereto.

1. Contrary to AT&T's claims, nothing in the Act or in FCC precedent requires this Commission to issue *any* recommendation to the FCC on section 272 compliance at all. AT&T's claim that this Commission must provide the FCC with a new factual record on section 272 because the "FCC is required by law to consult with the state commission on any application"²⁵ is misleadingly incomplete: While Congress did direct the FCC to consult with state commissions on a number of aspects of a section 271 application, it pointedly *did not* provide for such consultation with respect to the applicant's compliance with section 272. AT&T cites (but does not quote) section 271(d)(2)(B), which establishes the FCC's duty to consult with the states on a section 271 application.

Section 271(d)(2)(B) provides as follows:

(B) CONSULTATION WITH STATE COMMISSIONS. — Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with *the requirements of subsection (c)*.”²⁶

The “requirements of subsection (c)” encompass only two things: the Track A and B requirements (section 271(c)(1)) and the fourteen-point competitive checklist (section 271(c)(2)). These are the two parts of section 271 that relate to local competition issues specific to each state, and for which state consultation makes sense. But the provision requiring the FCC to determine the applicant's compliance with section 272 is *not* one of “the requirements of subsection (c)”; instead, it is found in subsection 271(*d*)(3)(B). For that reason, it is not embraced by the FCC's statutory consultation obligation. The Washington Commission has noted this very point:

²⁵ AT&T's Motion to Reopen and Supplement the Record (Sept. 26, 2002) at 10-12 (“AT&T Motion”)(citing 47 U.S.C. §271(d)(2)).

²⁶ 47 U.S.C. § 271(d)(2)(B) (emphasis added).

Under the plain language of the statute, section 271(d)(2)(B), it does appear that a state commission's duty is limited to reviewing BOC compliance with the requirements of section 271(c).²⁷

Thus, although this Commission did conduct extensive proceedings to review Qwest's compliance with section 272, it was never required to do so. The Commission is not obligated to repeat that exercise at AT&T's behest now. Nor would it make sense to do so when the FCC is already reviewing the issue.

AT&T's suggestion that the FCC nevertheless "relies" on the states to develop a record on section 272 is equally disingenuous. AT&T Motion at 4. AT&T cites various FCC statements about the "opportunity [for states] to present their views *regarding the opening of the BOC's local networks to competition*," to "the status of *local competition*," and to "a state commission's verification *under section 271(d)(2)(B)*." AT&T Motion at 5 (quoting *Ameritech Michigan Order*) (emphases added).²⁸ But all of these references

²⁷ Washington Order ¶ 11.

²⁸ Memorandum Opinion and Order, Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Services in Michigan, 12 FCC Rcd 20543 ¶ 30 (1997). *See also, e.g., SBC Texas Order* ¶¶ 17-18 (looking to the Texas Commission's determination that SBC "has taken the statutorily required steps to open its local markets to competition" by establishing interconnection agreements with competing carriers and carrying out its obligations under the 14 point checklist); Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953 ¶ 20 (1999) (aff'd sub nom, *AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. 2000) ("Bell Atlantic New York Order") (explaining that the FCC "must consult with the relevant state commission to verify that the BOC has one or more state approved interconnection agreements with a facilities-based competitor, or a statement of generally available terms and conditions (SGAT), and that either the agreement(s) or general statement satisfy the 'competitive checklist.'"); Memorandum Opinion and Order, *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988, App. D ¶ 2 (2001) ("Verizon Massachusetts Order") (same).

are to the state-dependent local competition factors of section 271(c) (and the state's consultation with respect to these same factors under section 271(d)(2)(B)). None of these passages is discussing compliance with section 272. That is not surprising, since a BOC's relationship with its section 272 affiliate would not be expected to vary from state to state.

In the present case, as the Washington Commission noted, "[t]he FCC has given state commissions no indication that it wants additional state review into this matter."²⁹ On the contrary, the FCC is considering Qwest's refiled section 271 application on an expedited comment schedule, and it has actually *shortened* the time for states to weigh in. At the ROC open session on September 23, 2002, the FCC staff advised the states that, with respect to Qwest's refiled federal applications: 1) it is not necessary for the states to conduct an evaluation of section 272 or the new affiliate; 2) the section 272 matters are interLATA issues within the purview of the FCC; and 3) the states can provide comments to the FCC on section 272 in their comments filed on the upcoming application.

The FCC's decision to consider the refiled applications without requiring new rounds of state proceedings is entirely consistent with its practice on previous withdrawn and refiled section 271 applications; indeed, the FCC has not asked state commissions to conduct new hearings even when the issue prompting a BOC's refiling has involved subsection (c) issues of checklist compliance, as to which the FCC *is* required to consult with the states.³⁰ Here, where the refiling issue is a section 272 issue that does not vary from state to state at all, further state proceedings would be even more superfluous.

²⁹ Washington Order ¶ 12.

³⁰ When Verizon withdrew and refiled its 271 application in Massachusetts, for example, the Massachusetts commission did not ask Verizon to submit to new hearings,

2. AT&T also offers no practical need for sacrificing the obvious consumer benefits of increased long-distance competition by delaying Qwest's entry into the interLATA market now that Qwest has opened its local markets to competition. Qwest has already demonstrated in exhaustive proceedings before this Commission its ability to establish a separate affiliate, separate personnel, separate books, posted transactions, and nondiscrimination and cross-subsidization protections, as well as controls reasonably designed to assure compliance with these requirements of section 272. As noted above, the Staff and ALJ have already examined and confirmed Qwest's compliance with each of these requirements.

AT&T now maintains it needs a second chance to attack the section 272 controls already examined and endorsed by Staff and the ALJ because Qwest has substituted one affiliate entity for another in these business processes. However, as the Washington Commission recognized, such a new round of proceedings would constitute "a waste of

even though the dispute that had led to the withdrawal related to the checklist. Rather, it reviewed the additional evidence that Verizon submitted to the FCC and verified — in the course of the process at the FCC — that it could reaffirm its order recommending 271 approval. *See* Evaluation of Massachusetts Dept. of Telecom and Energy of Verizon Massachusetts Compliance with Section 271 of the Telecommunications Act of 1996, *In the Matter of Application by Verizon New England Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Massachusetts*, FCC CC Docket No. 01-9, filed Feb. 6, 2001, at i (noting on the basis of Verizon "supplemental filings" with the FCC that its new application "supports and further confirms the conclusions we reached last year"). And the Texas commission did not demand any additional review of SBC's application for Texas between withdrawal and refiling (which, in fact, occurred on the same day), even though the issue that triggered the refiling involved checklist compliance. *SBC Texas Order* ¶ 16. In neither of these nor other cases did the FCC or the states submit to the kind of delaying tactics that AT&T is now proposing.

administrative resources.”³¹ Even AT&T itself concedes that “[c]reating a new subsidiary may resolve the section 272 affiliate’s GAAP problems.”³² Although AT&T makes much noise about the need for section 272 accounting controls,³³ Qwest is demonstrating to the FCC that such controls are in place and that QLDC is in compliance with all requirements of section 272, including section 272(b)(2). The FCC will address

³¹ Washington Order ¶ 1.

³² AT&T Motion at 10-11. AT&T’s further suggestion that “the BOC also must be in compliance with [GAAP]” under section 272, *id.* at 10, plays fast and loose with the Act. Section 272(c)(2), which establishes the BOC’s accounting duties, is limited in scope to the BOC’s transactions with its affiliate. *See* 47 U.S.C. § 272(c)(2) (establishing requirements only for the BOC’s “transactions with an affiliate described in subsection (a)”). No question has been raised regarding QC’s compliance with GAAP in its direct transactions even with QCC, much less with Qwest’s new section 272 affiliate.

AT&T’s speculation that QLDC will resell long-distance services from QCC, raising (in AT&T’s mind) “additional issues” of discrimination, is entirely unfounded. AT&T Motion at 10 n.23. In fact, QLDC will be a switchless reseller of an unaffiliated IXC’s long distance services. *See* Brunsting Declaration ¶ 19(a).

³³ AT&T cites its own prior allegations of “numerous instances of failure to timely accrue, timely bill for services and meet the terms of the intercompany agreements” to suggest that QLDC may not be prepared to comply with section 272. AT&T Motion at 8. However AT&T neglects to mention that the Staff and ALJ found, and KPMG’s review specifically confirmed, that Qwest adopted controls sufficient to correct for these long-past incidents and assure compliance going forward. ALJ Order ¶¶ 75-100; Staff Report ¶¶ 178-95, 203-06.

AT&T’s further speculation (AT&T Motion at 7-8) that it may take “several months” for Qwest to implement section 272 accounting controls to govern transactions between QLDC and QC is incorrect; those procedures are the same as existed between QCC and QC and are in place today. *See* Brunsting Declaration, ¶¶ 2-13; *See also* Supplemental Declaration of Marie E. Schwartz, Section 271(d)(3)(B) Compliance with Section 272 by the BOC, *Qwest Communications International Inc., Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska, North Dakota, Montana, Utah, Washington, and Wyoming*, FCC WC Docket No. 02-314 (filed Sept. 30, 2002) ¶¶ 5-13. The statement that AT&T quotes (Motion at 7) from Oren Shaffer, Qwest parent’s (QCII’s) Chief Financial Officer, is taken entirely out of context; while Mr. Shaffer does say that QCII is still in the process of reviewing the past accounting practices of its corporate family as a whole, nothing in his statement suggests that Qwest has yet to implement its section 272 accounting controls for QLDC. Mr. Shaffer’s letter does not refer to QLDC at all.

QLDC and decide this question imminently, and its answer for the nine application states will be the same as it would for Arizona. This Commission will not lose its role in these matters in the future by deferring to the FCC now; this Commission's role in the biennial section 272 audits gives it extra assurances of the section 272 affiliate's continued compliance going forward.³⁴

CONCLUSION

For the foregoing reasons, Qwest respectfully asks the Commission to deny AT&T's motion.

Dated this 7th day of October 2002.

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³⁴ See *Bell Atlantic New York Order* ¶ 412; *SBC-Texas Order* ¶ 406; Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237 ¶ 260 (2001), modified, *Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001).

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[Service Date September 26, 2002]

BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

In the Matter of the Investigation Into)	
)	DOCKET NO. UT-003022
U S WEST COMMUNICATIONS, INC.'s)	
¹)	
)	DOCKET NO. UT-003040
Compliance With Section 271 of the)	
Telecommunications Act of 1996)	
.....)	44 TH SUPPLEMENTAL ORDER;
)	DENYING AT&T'S MOTION
In the Matter of)	TO REOPEN THE
)	PROCEEDING AND
U S WEST COMMUNICATIONS, INC.'s)	SUPPLEMENT THE RECORD
)	
Statement of Generally Available Terms)	
Pursuant to Section 252(f) of the)	
Telecommunications Act of 1996)	
.....)	

I. SYNOPSIS

1 *In this Order, the Washington Utilities and Transportation Commission denies AT&T's motion to reopen the proceeding and supplement the record. Neither the Act nor the FCC requires that this Commission reopen the proceeding. Further, at this time, reopening the proceeding would be a waste of administrative resources, if all fourteen states in Qwest's region—or even just our state—were to consider an issue that will soon be directly before the FCC.*

II. MEMORANDUM

2 **Procedural Background.** On September 10, 2002, Qwest Corporation (Qwest) withdrew its pending applications before the Federal Communications Commission

¹ After this proceeding began, U S WEST merged and has become known as Qwest Corporation. For consistency and ease of reference we will use the new name Qwest in this Order.

(FCC) for authorization under section 271 of the Telecommunications Act of 1996² to provide in-region interLATA service in Washington and eight other states. Qwest withdrew its applications because of concerns that its long distance affiliate, Qwest Communications Corporation (QCC) did not meet the requirement under section 272(b)(2) to maintain its books, records, and accounts in accordance with generally accepted accounting practices (GAAP). In a letter filed with the Washington Utilities and Transportation Commission (Commission) on September 16, 2002, Qwest stated that it planned to file supplemental applications for all nine states with the FCC by the end of September, and to create a “new long distance affiliate that will not have the financial accounting issues that the FCC questioned.”

3 On September 18, 2002, AT&T Communications of the Pacific Northwest, Inc., and AT&T Local Services on behalf of TCG Seattle and TCG Oregon (collectively AT&T) filed with the Commission a Motion to Reopen and Supplement the Record. In its motion, AT&T asks that the Commission reopen the record in this proceeding and require Qwest to supplement the record with evidence demonstrating that Qwest and its new long distance affiliate are in compliance with section 272.

4 On September 20, 2002, Qwest filed with the Commission its Opposition to AT&T’s Motion to Reopen and Supplement the Record. On September 23, 2002, the Public Counsel Section of the Attorney General’s Office filed with the Commission its Response to AT&T Motion to Reopen.

5 **AT&T’s Motion.** AT&T asserts that the FCC is required to consult with state commissions on any application, citing section 271(d)(2)(B). AT&T further asserts that the FCC requires states to develop a comprehensive, factual record concerning Bell Operating Company (BOC) compliance with section 271. AT&T asserts that when a BOC files a subsequent application, the states should submit a factual record demonstrating that the BOC has corrected the problems in the previous application.

6 AT&T asserts that the FCC can no longer give any weight to this Commission’s prior determination on Qwest’s compliance with section 272 of the Act. Because of the new facts, i.e., Qwest’s withdrawal of its applications and creation of a new long distance affiliate, AT&T asserts that the Commission should reopen the record, take new evidence and compile a new record to support Qwest’s application before Qwest

² Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.*

files its supplemental application with the FCC. AT&T requests that the Commission order Qwest to file testimony concerning its efforts to create a new long distance affiliate and allow other parties an opportunity to respond before making a new recommendation to the FCC.

7 **Qwest's Response.** Qwest asserts that there is no legal basis for the Commission to reopen the proceeding and that multiple state commission reviews of the same issue before the FCC would be a waste of administrative resources. Qwest asks that the Commission deny AT&T's motion.

8 Qwest asserts that state commissions have no statutory duty to review Qwest's compliance with section 272. Qwest asserts that section 271(d)(2)(B) limits state commission review to questions about BOC compliance with section 271(c). Qwest asserts that section 271(c) addresses issues of local competition, i.e., the fourteen point competitive checklist and the Track A and B requirements, but does not include compliance with section 272.

9 Countering AT&T's argument that the FCC requires states to develop a comprehensive factual record for subsequent BOC applications under section 271, Qwest argues that the FCC has determined that when a BOC application is withdrawn and promptly refiled, states need not to develop a factual record to support the subsequent BOC application. Further, Qwest asserts that the issue of whether its new long distance affiliate, Qwest LD Corporation, will comply with section 272 is properly a question for the FCC, as the issue is not state-specific and will be the same in each of the fourteen states in Qwest's region.

10 **Public Counsel's Response.** Public Counsel supports AT&T's motion to reopen the proceedings. Public Counsel asserts that the Commission's responsibilities for verifying Qwest's compliance with the Act extend to any new application. Public Counsel recommends that if the Commission reopens the proceeding, the proceeding should not be limited to a review of section 272 issues. Public Counsel urges the Commission to initiate an investigation into whether Qwest's failure to file certain agreements with the Commission bears on whether a section 271 application would be in the public interest.

11 **Discussion and Decision.** This Commission reviewed Qwest's compliance with section 272 of the Act during our section 271 proceeding, as have other state

commissions in Qwest's fourteen-state region. Based on evidence presented during the fourth workshop and in hearings before the Commission, we determined that Qwest had complied with the requirements of section 272. Despite Qwest's apparent interest in having the Commission review its compliance with section 272, Qwest now asserts that the scope of state commission review under section 271(d)(2)(B) is limited to the 14-point competitive checklist and the Track A and B requirements. Under the plain language of the statute, section 271(d)(2)(B), it does appear that a state commission's duty is limited to reviewing BOC compliance with the requirements of section 271(c). Every state conducting a review of Qwest's compliance with section 271, however, has addressed the issue of compliance with section 272.

- 12 Although the scope of the mandate for state consultation with the FCC is not entirely clear, the FCC has previously provided that state commissions need not conduct further evidentiary proceedings concerning applications that are withdrawn and promptly refiled.³ The FCC has given state commissions no indication that it wants additional state review into this matter.
- 13 Further, the issue in Qwest's supplemental application before the FCC will be whether Qwest's new long distance affiliate complies with the requirements of section 272. As Qwest notes, that issue would be the same in each of the fourteen states in which Qwest operates, and does not merit investigation by each state. Judicial economy requires that this issue be reviewed only by the FCC, not by fourteen individual states.
- 14 Based on the foregoing discussion, we deny AT&T's motion to reopen the proceedings and supplement the record. Neither the Act nor the FCC requires this Commission to reopen the proceeding, and doing so is not in the interest of judicial economy.

³ *In the Matter of SBC Communications Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, CC Docket No. 00-65, FCC 00-238, ¶16 (rel. June 30, 2000).

II. ORDER

15 IT IS ORDERED That AT&T's Motion to Reopen and Supplement the Record is denied.

DATED at Olympia, Washington and effective this _____ day of September, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).